80-479
No.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

R. C. FRENCH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AS EVIDENCED BY ITS OPINION OF AUGUST 7, 1980, ERRED IN REVERSING THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI THAT GRANTED PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL TO TWO COUNTS OF VIOLATING 18 U.S.C. § 1951 (Hobbs Act Extortion) AND THEREBY VACATED PETITIONER'S CONVICTION ENTERED BY THE JURY AS TO THOSE COUNTS IN THAT:

A. THE UNITED STATES GOVERNMENT HAS FAILED TO ESTABLISH THAT THE PETITIONER, R. C. FRENCH, WHILE A CITY MARSHALL FROM THE CITY OF ST. LOUIS, MISSOURI EXTORTED MONEY UNDER COLOR OF OFFICIAL RIGHT FROM CLAUDE TORREY, A BAIL BONDSMAN, OF THE STATE OF MISSOURI.

B. THE UNITED STATES GOVERNMENT HAS FAILED TO ESTABLISH THAT BY HIS BUSINESS DEALINGS WITH SAID CLAUDE TORREY, THE PETITIONER, R. C. FRENCH INTERFERRED WITH INTER-STATE COMMERCE.

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS EIGHTH CIRCUIT

R. C. French, your Petitioner, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals, Eighth Circuit, entered in the above-entitled cause on August 7, 1980.

OPINIONS BELOW

This cause was originally decided by the United States District Court for the Eastern District of Missouri, Eastern Division on January 11, 1980, see Appendix "A". Subsequently, this cause was then decided by the United States Court of Appeals for the Eighth Circuit on August 7, 1980, see Appendix "B". A Peti-

tion for Rehearing or, in the Alternative, Motion for Rehearing En Banc was timely filed with the United States Court of Appeals, Eighth Circuit on August 19, 1980. The Petition for Rehearing and Rehearing En Banc were ordered denied on August 28, 1980. (See Appendix "C").

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on August 7, 1980. The order of the United States Court of Appeals for the Eighth Circuit denying Petitioner's Motion for Rehearing or, in the Alternative, Motion for Rehearing En Banc was entered on August 28, 1980. The jurisdiction of this Court is invoked under 28 USC, Section 1254 (1) and Rule 19.1(b) of the Rules of the Supreme Court of the United States.

RELEVANT STATUTES

§ 1951. Interference With Commerce By Threats Or Violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

June 25, 1948, c. 645, 62 Stat. 793.

18 U.S.C. §1951 (1976 Edition found in Volume III at page 1231).

STATEMENT OF THE CASE

R. C. French was charged by the United States Grand Jury of the Eastern District of Missouri in a seven count Indictment with Michael Moran, the Chief Deputy Marshal of the City of St. Louis. Count I of this Indictment charged Moran and the Petitioner with violating 18 U.S.C. 1961, 1962(d), and 1963 by conspiring together to violate 18 U.S.C. 1951. Counts II, III, IV, V, and VI charge Petitioner R. C. French with violating 18 U.S.C. 1951 (Hobbs Act Extortion) by obtaining from certain bail bondsmen, under color of official right, certain sums of money. In particular, Count V charged R. C. French with obtaining approximately the sum of $300.00 from Claude Torrey, a bail bondsman, on or about June 9, 1978 and Count VI charged R. C. French with collecting approximately $100.00 from said Claude Torrey, on or about August 7, 1978. Count IV also

charged Michael Moran with aiding and abetting Petitioner R. C. French in committing a 1951 Hobbs Act violation. Count VII charged Michael Moran with violation of a federal law not pertinent to this Petition. Federal jurisdiction to hear this case in the United States District Court was predicated on 18 U.S.C. § 3231.

The trial was held before the Honorable John K. Reagan, District Judge, Eastern District of Missouri. This trial started on October 29, 1979 and ran to November 6, 1979. At the conclusion of the case presented by the United States Government, the Honorable Judge Reagan granted the Petitioner his Motion for Judgment of Acquittal as to Count I. After hearing all the evidence, the jury in this case returned a verdict of finding the Petitioner R. C. French guilty of Counts V and VI and not guilty of the remaining counts. Michael Moran was found not guilty on all of the counts.

R. C. French then filed a Motion for Judgment of Acquittal at the Close of All the Evidence in the case. On November 30, 1979 the Petitioner French also filed a legal memorandum in support of his Motion for Judgment of Acquittal at the Close of All the Evidence in the case as pertaining to Counts V and VI. On January 11, 1980 the Honorable John K. Reagan, District Judge of the Eastern District of Missouri entered an order sustaining Petitioner French's Motion for Acquittal as to Counts V and VI thereby setting aside his conviction on those Counts and ordering the Clerk of the Court to enter a Judgment of Acquittal on both of said Counts. Said order was based on the failure of the government to present sufficient evidence to bring about a finding that R. C. French committed the requisite extortion acts and that the said acts did have the required effect upon interstate commerce to find a violation of the Hobbs Act.

The United States Government appealed said order to the United States Court of Appeals for the Eighth Circuit. On August 7, 1980 the United States Court of Appeals for the

Eighth Circuit reversed the ruling of the trial judge as to his order reversing the conviction of Petitioner R. C. French and remanded the case to the Honorable Judge Reagan to reinstate the judgment of conviction and to sentence the Petitioner.

In presenting the facts in the light most favorable to the Government, the following evidence presented at trial is relevant to this Petition:

On April 29, 1973, R. C. French was appointed Marshal of the City of St. Louis. After he took office, one of French's first jobs was to take care of a large quantity of bond forfeitures of a group of bondsmen named Group Underwriters. After entering into discussions with the mayor of St. Louis, Mayor Poelker, the mayor suggested to French that he should talk to the Law Department about a reasonable settlement for these forfeitures. The Petitioner discussed these potential offers of settlement to Group Underwriters with Jack Koehr of the St. Louis City Counselor's office. Koehr told Mr. French to try and be fair and reasonable in these settlements. As a result, French collected some money from Group Underwriters but was unable to collect the full amount of the bond forfeitures.

Based on the Charter of St. Louis and his conversations with Mayor Poelker, it was R. C. French's understanding that the mayor was the only one who could have authorized the power to settle bonds. The mayor told Mr. French that he could bargain with Mr. Koehr about the bonds, but that the final decision rested with Mayor Poelker on whether Mr. French could compromise bond judgments. Finally, Jack Koehr never told Mr. French that Petitioner could not settle bond judgments.

Sometime after the Group Underwriter's settlement, several of the professional bondsmen, including Claude Torrey, complained that they were getting treated differently than the insurance companies. Mr. French then would settle $500 bonds for these bondsmen for $212 then at $262 and finally at $312. However, R. C. French would make the final determination on the amount of a bond settlement.

After Petitioner took office, he started a bad bond list, which he called a Disqualification List. The purpose of this list, which came out once a week, was to alert the various agencies across the city and the county that certain bondsmen should not be doing business. However, by Mr. French's own admission, this list was not complete.

Though his name was not on it at the start, Claude Torrey's name managed to appear on the Disqualification List several times. Claude Torrey is a professional bondsman. Between the years of 1974 and 1978, Torrey used his car in business about 90% of the time. He estimates he uses about 40 gallons of gas a week. Torrey also advertises in the Yellow Pages and uses the services of a beeper company. Torrey bonds non-Missouri residents, but these bonds were all on counts within the state of Missouri. On occasion, Torrey must leave the boundary of Missouri to find defendants who had forfeited their bonds. In addition, Torrey writes bonds for two insurance companies, one of which is located in New York City. Finally, Torrey uses various kinds of business supplies, some of which are purchased in Texas.

During the period in question, Torrey handled between 50 and 75 defendants per year in his bonding business. If he was unable to find a defendant, Torrey would have to pay a bond forfeiture which would be in full amount of the bond, $500, plus $12 court costs.

Torrey initially met Mr. French in 1973 after Petitioner took the office of St. Louis City Marshal. Torrey then had a second meeting with the City Marshal where he was told that Torrey would not be allowed to pay gratuities to deputies. According to Mr. French, this was done to keep a smooth, clean-cut office.

Later in 1973 or early 1974, Torrey alleged that Mr. French offered to Torrey that, in cases where Torrey could not find the defendants, Petitioner would help get bond forfeitures set aside for a fee between $25 and $75. Sometime in 1974, Torrey once

again visited R. C. French. This time, he claims that French directed him to pay a $10 surrender fee directly to Mr. French. Originally, these were payments that Torrey had been making to the Deputy Marshals of the City of St. Louis. Torrey estimated he paid this fee 100 times. From 1973 to the end of 1977, Torrey claimed that he paid money to the City Marshal some 50 to 75 times after Torrey failed to find a defendant.

Torrey charged that starting in 1977, Mr. French indicated to him that R. C. wanted $100 in cash in addition to the amount of the bond settlement. Torrey stated that the City Marshal told him that he had the authority from the City Counselor's office to compromise bond judgments for $212 or $262.

At first, Torrey was angry at this announcement and he wanted to discover the purpose of the extra $100 and whether a bond forfeiture could be set aside for $212 or $262. So, he went over to see Jack Koehr, the City Counselor. However, after discovering that Koehr was not in the office and was out to lunch, Torrey left the Counselor's office and never returned.

It was Torrey's understanding that he would not be placed on the Disqualification List if Torrey would start paying R. C. French the money. So, Torrey would write out a check made payable to the City of St. Louis for the amount of the bond forfeiture and allegedly paid R. C. French an extra $100 in cash. Specifically, on June 9, 1978, Torrey made a check out for $636, payable to the City of St. Louis Marshal's Office for three bond forfeiture judgments and on August 7, 1978, Torrey made a check out for $262, payable to the City Marshal, City of St. Louis for one bond forfeiture judgment. Each time Torrey claimed he made a $100 payment per bond forfeiture. It is also alleged that around December, 1977, Torrey wrote another check for $262 made payable to the City Marshal, City of St. Louis, and a payment of $100 cash to R. C. French.

Nonetheless, there were also times between 1974 and 1977 when Torrey paid off in full the bond judgment plus the court costs. On each of those occasions Torrey decided to pay the full judgment to get a tax deduction. R. C. French's alleged response to Torrey paying off the entire judgment was that he preferred that Torrey would not pay off his forfeiture in that manner.

REASONS FOR GRANTING THE WRIT

The reason why this Court should grant this Petition for Writ of Certiorari is that the Eighth Circuit of the United States Court of Appeals has decided two important questions of federal law, as cited in the Questions Presented for Review section, in interpreting U.S.C. § 1951. Said questions have not been, but should be settled by this court due to the increasing number of Hobbs Act cases.

As pointed out by this Court, to prove a violation of the Hobbs Act, the United States Government must show both extortion and an interference with commerce. *Stirone* v. *United States,* 361 U.S. 212, 218 (1960). Regarding the extortion element of this offense, as pointed out by the Eighth Circuit in its opinion of this case, there is not a great deal of applicable legislative history to interpret the meaning of "color of official right". (See Appendix B, Pg. 7, n. 4) 18 U.S.C. § 1951 cases. The only guidelines stated by the Eighth Circuit are that Congress intended to adopt the definition of extortion in common law, particularly as it was defined in New York. (See Appendix B, pg. 7). Federal Appellate Courts, especially the Third Circuit has held that New York law would define Hobbs Act extortion. *United States* v. *Nedley,* 255 F.2d 350 (3d Cir. 1958). In earlier matters, using New York cases as a basis of interpretation, the Third Circuit held that in all the Hobbs Act Extortion situations the essence of this crime was duress. *United States* v. *Addonizio,* 451 F.2d 49, 72 (3d Cir. 1972); *cert. denied* 405 U.S. 936 (1972) reh. denied 405 U.S. 1048 (1972); *citing, People* v. *Dioguardi,* 8 N.Y.2d 260, 168 N.F.2d 683, 203 N.Y.S.2d 870 (N.Y. 1960).

In later decisions, the various circuits have stated that "under color of official of right" cases there needs to be no showing of overt coercion. *United States* v. *Mazzei,* 521 F.2d 639, 645 (3d Cir. 1975); *United States* v. *Staszcuk,* 517 F.2d 53 (7th Cir. 1975). *cert. denied,* 423 U.S. 837 (1975). *United States* v. *Price,* 507 F.2d 1349 (4th Cir. 1974). *cert. denied,* 423 U.S. 1014

(1975). However, in the *Mazzei* case, the Third Circuit maintained that in those types of extortion, the jury still must at least find that the "victim" had and the defendant exploited a reasonable belief that the defendant had the actual authority that the defendant said he possessed. *United States* v. *Mazzei, supra,* at 643, *see also, United States* v. *Braasch,* 505 F.2d 139 (7th Cir. 1974), *cert. denied,* 421 U.S. 910 (1975). In the Eighth Circuit, that Court stated in a "color of official right" case, *United States* v. *Adcock,* 558 F.2d 397, 406; *cert. denied,* 434 U.S. 921 (1977); that the state of mind of the victim of the extortion is a necessary element to a Hobbs Act extortion conviction. *Id.* at 403. However, in the French opinion, the Eighth Circuit held that this case was irrelevant. (See Appendix B, p. 12 n. 5).

Thus, this Court should examine this case to see if the Eighth Circuit should be allowed to read the Hobbs Act so broadly. The interpretation of the Eighth Circuit in the case at bar would completely erase the necessity of presenting the victim at trial. In other words, whether the "victim" suffers any harm or is injured in any way or feels he is compelled to do something that he would not normally wish to do becomes totally irrelevant and unnecessary. It is Petitioner's contention that in victim oriented offenses, the victim's state of mind should be of some significance.

Another reason that the Court should consider this Petition is the growing concern among scholars and federal judges concerning the development of this form of Hobbs Act extortion. A law professor, now an Assistant Deputy Attorney General of the United States, has written an in-depth report on the dangers of federal prosecution of local corruption and illegal practices. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy.* 65 Georgetown L. J. 1171, 1196 (1977). In addition, in a recent Hobbs Act case, one Federal Court of Appeals' Judge for the Third Circuit has expressed a need to re-evaluate the prior decisions in that circuit

regarding its decision in *United States* v. *Kenny,* 462 F.2d 1205 (3d Cir. 1972) *cert. denied,* U.S. 914 409 (1972) which was the first case in that circuit to hold that the Government need not establish proof of threat, fear or duress in an extortion "under color of official right" case. *United States* v. *Cerilli,* 603 F.2d 415, 426-437 (C.J. Aldisert dissenting); *cert. denied,* 100 S.Ct. 728 (1980).

Finally, this Court should grant this Petition in order to discover whether the Eighth Circuit followed the intentions of Congress in passing the Hobbs Act. *United States* v. *American Trucking Associations,* 310 U.S. 534, 542 (1940); *United States* v. *Bass,* 404 U.S. 335, 348 (1971). There is some holding in the various Federal Court of Appeals decisions that the purpose of passing to the Hobbs Act was particularly with the labor union to control professional gangsterism. *Carbo* v. *United States,* 314 F.2d 718 (9th Cir. 1963); *United States* v. *Yokley,* 542 F.2d 300 (6th Cir. 1976); *United States* v. *Brecht,* 540 F.2d 45 (2nd Cir. 1976); *see also, United States* v. *Emmons,* 410 U.S. 396 (1973).

In addition, the Hobbs Act is under a chapter of criminal offenses titled Racketeering Statutes. The official title of the Hobbs Act is "Interference with commerce by threats or violence". In view of the lack of legislative history in this area of law, these titles, tools of statutory interpretation, should be given some importance in deciding whether the case at bar fits within the intentions of Congress in passing the Hobbs Act. *Brotherhood of Railroad Trainmen* v. *Baltimore & O.R.R.,* 331 U.S. 519 (1947). It is Petitioner's contention that the Eighth Circuit has gone far beyond the intentions of Congress.

Finally, this Court should determine whether the Petitioner has made the requisite effect on interstate commerce. Particularly, this Court must decide whether this decision by the Eighth Circuit has expanded federal jurisdiction to the point of altering "sensitive federal-state relationships". *Rewis* v. *United States,* 401 U.S. 808, 872 (1971); *United States* v. *Bass,* 404 U.S.

336, 349 (1971). As recognized by these cases by this Court, the state government should be left alone to prosecute those people who have committed a crime against the state or a municipality of the state. Basically, if anything, that is what has transpired in the case at bar. If there is a victim as presented by these facts, it would be the City of St. Louis. It was the City of St. Louis who was denied the bond forfeiture money to which it has legally entitled by the laws of Missouri. Thus, it is the State of Missouri that should pursue this matter if it desires without any interference from the federal government.

CONCLUSION

WHEREFORE, it is respectfully submitted that this Petition for Writ of Certiorari should be sustained.

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PROOF OF SERVICE

This is to certify that Charles M. Shaw, Shaw, Howlett & Schwartz, Attorneys for Petitioner herein, have served upon the following, three copies of the above Petition for a Writ of Certiorari: Solicitor General, Department of Justice, Washington, D.C. 20530; Robert D. Kingsland, United States Attorney, 1114 Market Street, St. Louis, Missouri 63101.

APPENDIX

APPENDIX "A"

Memorandum and Order of the United States District Court for the Eastern District of Missouri, Eastern Division, of January 11, 1980 in *United States* v. *R. C. French.*

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 79-124CR (B)

United States of America,
Plaintiff,

vs.

R. C. French,
Defendant.

MEMORANDUM AND ORDER

(Filed January 11, 1980)

Defendant French was found guilty on Counts V and VI of an indictment charging him with violating Section 1951, 18 U.S.C. He was acquitted on all other counts charging him with similar offenses. Theretofore, at the close of all the evidence, French had moved for a judgment of acquittal. We reserved ruling the motion. The motion is now before us for disposition.

Section 1951 (the Hobbs Act) proscribes extortion which in any way or degree obstructs, delays or affects commerce. "Extortion" as used in the statute includes "the obtaining of property from another, with his consent, induced . . . under color of official right." Extortion under color of official right is the wrongful taking by a public officer of money or property not due him or his office.

The motion for acquittal brings into question the sufficiency of the evidence to warrant a finding either of extortion or of an

adverse effect of the alleged extortion upon commerce. In determining this issue, we, of course, view the evidence in the light most favorable to the government.

At the times in question French was the Marshal of the City of St. Louis, one of whose duties (under the City Charter) was to collect the full amounts of bail bond judgments pursuant to judgment orders of the City Court. Count V of the indictment charged that French unlawfully affected commerce or attempted to do so by obtaining under color of official right the sum of $300 not due him or his office directly or indirectly from Claude Torrey, a bail bondsman, in return for not complying with an order of the St. Louis City Court to collect the full amount of three bond judgments owed the City of St. Louis by said bondsman. Count VI, which involved only one bond judgment charges a similar offense except for the date and the amount French allegedly obtained from the bondsman.

The government's evidence was to the effect that although French was ordered to collect the full amount owing to the City by the bondsman, he would (without specific authority) "compromise" and satisfy each $512 bond forfeiture judgment for less than the full amount. The procedure followed with respect to each judgment was to obtain from Torrey a check payable to the City of St. Louis in the amount of either $212 or $262 and a cash payment of $100, representing that he (French) intended to pocket the cash, in return for French's promise not to collect the balance owing the City. In each instance the total payments by Torrey were in an amount substantially less than he owed the City. As a result, Torrey was enabled to continue to engage in his bail bond business.[1]

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[1] Rules 32.14 and 37.107 of the Missouri Supreme Court prohibit bail bondsmen with outstanding forfeiture judgments from writing bail bonds anywhere within the State of Missouri.

Understandably, Torrey would have preferred not to pay the $100 in cash to French in addition to the check for $212. However, it is obvious that, realistically, it was immaterial to him whether that cash payment was remitted to the City or was kept by French, so long as the total payment he made was substantially less than the amount owing by him. From his point of view as a businessman, Torrey was eliminating a $512 judgment debt for the sum of $312. Confronted with the choice of paying $512 or of paying $312 to be relieved of his judgment debt, Torrey obviously chose the latter. His choice would have been the same whether or not he was aware that French would appropriate to his own use $100 of the sum paid by Torrey.

The basic facts in this case are unlike those in any reported case to which we have been cited or of which we are aware in which the alleged extortion was under color of official right. In the instant case (under the government's evidence), it was French's duty to collect (and the obligation of Torrey to pay) $512, the full amount of each judgment. French had no authority to accept less than that amount by way of "compromise." Hence *all* the money paid by Torrey to French was due the office of French as the city's collection agent. Theoretically, of course, Torrey may have been "compromising" (without consideration therefor) each judgment against him for $212, but as a practical business matter he was paying to the office of the Marshal the sum of $312 with the resultant saving of $200 on each judgment.

There is no theory under which the $100 cash per judgment which Torrey paid to French was not rightfully money which belonged to the City. The fact that French *disclosed* to Torrey his intention to keep the $100 cash instead of remitting it to the City does not metamorphasize an embezzlement into an extortion situation. Unquestionably, as we have stated, Torrey would have paid to the office of the Marshal the $312 in one payment (either by check or in cash) in order to effect a saving to him of $200 even if he had not been told that French intended to embezzle the $100.

By way of contrast, in none of the cases sustaining convictions under the Hobbs Act was the money which the defendant extorted actually owing, directly or indirectly, to the defendant or to his office. The typical Hobbs Act "color of official right" prosecutions involve situations where money is paid or sought for the avoidance of police or other official harrassment or where an official obtains money for official favors.

For example, in *United States* v. *Brown,* 8 Cir. 1976, 540 F.2d 364, contractors made apartment rental payments for Brown's benefit in return for what they believed would be a friendly relationship toward them in his capacity as the city's Building Commissioner. Under no view of the facts could the amount of the rental payments be held to be payable or owing to the City or to the office of Brown. In *United States* v. *Rabbitt,* 8 Cir. 1978, 583 F.2d 1014, the defendant, Speaker of the Missouri House of Representatives, obtained a substantial sum of money in return for his "services" in steering to passage by the House a bill in which those paying the money were interested. Again, as in *Brown,* the money could not conceivably be held to be owing to the State of which the defendant was an official. And in *U.S.* v. *Adcock,* 8 Cir. 1977, 558 F.2d 397, the defendant, Chairman of the Iowa Liquor Control Commission, obtained money and property in return for official favors. In another Eighth Circuit case, *U.S.* v. *Merry,* 8 Cir. 1975, 514 F.2d 399, the defendant, a police officer, threatened official action against the operator of a massage parlor if substantial sums of money were not paid to the defendant. All of the cases in other circuits which we have studied also involve factual situations in which the money paid or demanded was not due or owing. None of them arose in an *embezzlement* context.

We hold that inasmuch as all of the moneys paid by Torrey under color of his office were actually owing to the office of the marshal as agent of the City, the receipt and retention by French of the cash payments would constitute embezzlement, a state offense, rather than extortion.

We are also convinced that the evidence wholly fails to show the requisite effect upon interstate commerce. There can be no doubt that for purposes of the Hobbs Act "(t)he connection with interstate commerce need only be slight." *U.S.* v. *Rabbitt,* supra, 583 F.2d at 1023. As held in *Rabbitt:* "If the resources of a business which affects interstate commerce are depleted and diminished as a result of extortion, then interstate commerce is affected." So, too, it is not necessary that the subject of the extortion constitute interstate commerce or that its purpose be to affect such commerce. *U.S.* v. *Spagnola,* 4 Cir. 1976, 546 F.2d 117.

In the instant case, the government's proof was to the effect that the *activities of the bondsman* affected commerce to some slight extent. However, what we are here concerned with is whether the "*extortion* in some degree, however slight, affected interstate commerce." Under the explicit language of Section 1951, that is the crux of the offense. The evidence sufficiently showed that Torrey, in his bail bond business, made purchases of services and supplies which originated in other states, the government's theory being that the allegedly extortionate payments diminished or depleted his resources available for such purposes. We do not question the correctness of this theory, but find it inapplicable under the instant facts.

In the usual Hobbs Act case, it is obvious that the extortionate payments of moneys which were not owing would necessarily, even though only slightly, diminish the resources which would be available for activities affecting commerce. In the present case, however, it is clear that as the result of making the cash payment of $100 to French, Torrey's resources for his purchases of services and supplies were *increased,* not diminished. That is, had he paid what he justly owed (the *full amount* of the judgment) his available resources would have been substantially less than the amount thereof which remained after making the $100 payment. Since French, under the government's evidence (and the indictment), had no authority to accept less than

the full amount of the judgment, it follows that as the result of the unauthorized "compromise" Torrey received a *benefit* to which he was not entitled and which he could not have insisted upon. Thus, after making the cash payments of $100, which were misappropriated by French, Torrey had some $200 in "windfall profits" on each judgment with which to purchase supplies and services, a sum which would not have been available to him but for the "compromise."

We add that whatever may have been the derelictions of French, we are limited in our consideration of the motion for acquittal to the *specific factual allegations* set forth in Counts V and VI. It is on *that* basis which we have concluded that the motion should be sustained.

Accordingly, IT IS HEREBY ORDERED that the motion of defendant French for acquittal on Counts V and VI should be and it is hereby sustained. The judgment of conviction on Counts V and VI of the indictment is hereby set aside and vacated and the Clerk is hereby ordered to enter a judgment of acquittal on both of said Counts.

Dated this 11th day of January, 1980.

/s/ JOHN F. REGAN
United States District Judge

APPENDIX "B"

Opinion of the United States Court of Appeals, Eighth Circuit of August 7, 1980 in *United States* v. *R. C. French.*

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1096

United States of America,
Appellant,

v.

R. C. French,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: May 22, 1980
Filed: August 7, 1980

Before BRIGHT, HENLEY and McMILLIAN, Circuit Judges.

McMILLIAN, Circuit Judge.

The United States appeals from an order of the district court setting aside a jury verdict finding appellee R.C. French, former Marshal of the City of St. Louis, guilty of two counts of affecting interstate commerce by extortion, in violation of the Hobbs Act, 18 U.S.C. § 1951. For the reasons stated below, we reverse and remand to the district court with directions to vacate the judgment of acquittal and hold it for naught, to reinstate judgment of conviction pursuant to the jury verdict and to sentence appellee accordingly.

Appellee, who had been indicted by a grand jury on five counts of violating the Hobbs Act, 18 U.S.C. § 1951, and one count of violating the Federal Anti-Racketeering Act, 18 U.S.C. §§ 1961, 1962(d), 1963, was tried before a jury which returned a verdict of guilty on two counts of violation of the Hobbs Act. Appellee had moved for acquittal at the close of the government's evidence, at which time the court reserved its ruling. After the jury's verdict, the court granted appellee's motion, vacated appellee's conviction and entered a judgment of acquittal on both counts.

In the two counts upon which the jury had found appellee guilty, he was accused of violating the Hobbs Act[1] by affecting interstate commerce through extortion under color of official right as city marshal. The district court was of the view that the government failed to prove either essential element of the crime: that appellee committed "extortion" as that act is defined under the Hobbs Act, and that the extortion affected commerce

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[1] The Hobbs Act provides in relevant part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion . . . shall be fined not more than $10,000 or imprisoned not more than twenty years; or both.
>
> (b) As used in this section—
>
> . . .
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> (3) The term "commerce" means . . . all commerce between any point in a State . . . and any point outside thereof; . . . and all other commerce over which the United States has jurisdiction.

18 U.S.C. § 1951.

and thereby came under the coverage of federal criminal law. A failure by the government to prove either of these essential elements of the crime would entitle appellee to an acquittal. *See Stirone* v. *United States,* 361 U.S. 212, 218 (1960). The government, however, claims that the proof was sufficient to support a finding against appellee on both matters. Reviewing the evidence in the light most favorable to the verdict, *see United States* v. *Hemphill,* 544 F.2d 341 (8th Cir. 1976), *cert. denied,* 430 U.S. 967 (1977), we agree that the verdict should not have been set aside.

I. **Hobbs Act Extortion**

At the time of the alleged extortion, appellee's official duties as city marshal included collection of bail bonds which had been forfeited when a defendant failed to appear in the municipal courts to answer the charges against him. If the bond was forfeited, the surety on the bond would be required to pay to the city the amount of the bond plus court costs.

The counts upon which appellee was found guilty involved four forfeited bonds, each in the amount of $500 with $12 court costs, and each naming Claude Torrey, a professional bail bondsman, as surety. It is undisputed that appellee did not obtain the full $512 for the city in settlement of any of the four bonds; instead, appellee received from Torrey two checks payable to the city, one for $636 to settle three of the bonds and another for $262 to settle the fourth bond. Torrey testified that as a *quid pro quo* for making these settlements, appellee required an additional cash payment for his own personal benefit of $100 per bond, which Torrey paid to appellee in a lump sum of $300 cash at the time of the $636 settlement and in $100 cash at the time of the $262 settlement.

Torrey also testified that he would have been unwilling to make the cash payments but was induced to pay by appellee's

offer to settle the bonds for less than $512 a piece, something appellee would not do without the cash payment.[2] According to Torrey, appellee claimed to have the power to settle the bonds. Although the evidence indicated that appellee did not in fact have legal authority to settle the bonds for less than $512, it is undisputed that appellee did accept the reduced payments and took no further steps to enforce the bonds. Taking the evidence in the light most favorable to the verdict, we therefore regard it as established that appellee took personal cash payments in return for accepting reduced amounts on behalf of the city to settle defaults.

The Hobbs Act contains a definition of prohibited extortion as "the obtaining of property from another, with his consent . . . under color of offical right." 18 U.S.C. § 1951(b)(2). "Extortion 'under color of official right' will . . . be established whenever evidence shows beyond a reasonable doubt 'the wrongful taking by a public officer of money not due him or his office, whether or not the taking was accomplished by force, threats, or use of fear." *United States* v. *Brown,* 540 F.2d 364, 372 (8th Cir. 1976), *citing United States* v. *Kenny,* 462 F.2d 1205, 1229 (3d Cir.), *cert. denied,* 409 U.S. 914 (1972). The

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[2] The government contends that an additional factor in the extortion was appellee's failure to place Torrey's name on a "bad bond list" of bondsmen who had failed to pay the city the amount due on forfeited bonds. Were Torrey not to have made the cash payoffs to appellee, asserts the government, appellee would have placed Torrey's name on the bad bond list either for failure to pay the four bonds involved in the accusations against appellee, or some other bond defaults Torrey had failed to satisfy. However, the counts of the indictment upon which appellee was found guilty charged only that appellee had extorted the cash payments in return for failing to enforce specific bonds. Moreover, the government's brief on this point below did not present this theory and the court below did not consider it. As we disagree on other grounds with the district court's analysis of the extortion issue, we therefore do not address the "bad bond list" theory advanced by the government.

district court concluded that this requirement had not been met, because the full sum of all money Torrey paid to appellant was less than the sum rightfully due to the sheriff's office as payment on the defaulted bonds. Under the district court's analysis, because Torrey owed $512 on each bond, any payment of up to $512 was money rightfully due the sheriff's office, even if appellee made known to Torrey that a part of the payment ($100 cash) was due to him personally as a *quid pro quo* in return for settling the bond at less than the face amount. The district court concluded, "There is no theory under which the $100 cash per judgment which Torrey paid to French was not rightfully money which belonged to the City." *United States* v. *French,* Cr. No. 79-124CR(B) (E.D. Mo. Jan. 11, 1980) (slip op. at 3-4). That is, the government therefore failed to prove that appellee had taken money not due his office.[3]

We cannot agree that as a matter of law no extortion was proven. There was evidence that Torrey paid one sum of money—$212 or $262—by check to the city to settle a defaulted bond, and a second sum of money—$100—in cash to appellee as a fee for making the settlement. The jury could have believed that Torrey's debt to the city was satisfied by payment of the amount of the check which was accepted in settlement of the bond; indeed, appellee himself testified that he accepted $212

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[3] The district court characterized appellee's conduct as "embezzlement" in distinguishing the conduct from extortion under the Hobbs Act. On appeal the government argues that appellee's conduct was not embezzlement. We are concerned only with whether or not the conduct was Hobbs Act extortion, regardless if it met the definition of some other local or common law offense, and regard the district court's discussion of embezzlement as an illustration of how the money taken by appellee could have been rightfuly due appellee's office, no matter how wrongful appellee's own conduct may have been. Our disagreement with the district court is that we think the jury could have found that appellee took money not rightfully due his office, and we express no opinion on whether appellee's conduct constituted embezzlement under local law.

and $262 payments to settle the $512 default obligations of bondsmen. Even if appellee did not have lawful authority to make such a settlement, the evidence indicates that the city did not pursue the obligation further after the settlement was paid. If the settlement check for $212 or $262 to the city in fact put an end to appellee's obligation under the bond, the additional cash payment would not be money due appellee's office, but would be a wrongful fee not due appellee or his office. Taking the evidence in the light most favorable to the government, the jury could have concluded that appellee received a wrongful fee for himself, beyond the amount the city sought to collect.

There is no doubt that Hobbs Act extortion "under color of official right" includes this kind of corrupt use of public office by the official to obtain such a wrongful personal fee. While the legislative history referring directly to the "color of official right" provision is not helpful on this point,[4] the legislative

[4] The only legislative history we have found for the "color of official right" language is a colloquy on the floor of the House of Representatives during debate on the predecessor of the Hobbs Act, H.R. Rep. No. 653, 78th Cong., 1st Sess. (1943), which was passed by the House of Representatives but failed in the Senate. "The remarks with respect to that bill . . . are wholly relevant to an understanding of the Hobbs Act, since the operative language of the original bill was substantially carried forward into the Act." *United States* v. *Enmons*, 410 U.S. 396, 404-05 n.14 (1973). During debate labor supporters expressed concern that the "color of official right" language would make it extortion for labor union officials to demand union dues. Reps. Hobbs and Summers (Chairman of the House Judiciary Committee which report the bill) both insisted that the language applied to only *public* officials. 89 Cong. Rec. 3228-29 (1943). The representatives saw the conduct covered by this provision as something akin to the common law crime of false pretenses. "In other words, you pretend to be a police officer, you pretend to be a deputy sheriff, but you are not." *Id.* at 3229 (remarks of Rep. Hobbs). Other comments by supporters indicated that the bill might also be construed broadly to cover "money acquired by somebody claiming to be a public officer," *id.* (remarks of Rep. Summers), a comment suggesting potential for quite broad coverage of wrongful acts by public officials or those assuming the guise of public office. The brief debate that occurred in 1943, however, was not clear enough to be determinative of the scope of the "color of official right" language, especially in light of the confusing reference to false pretenses type crimes, which would seem out of place in an extortion statute.

debates on the Hobbs Act suggest that Congress intended to adopt the common law definition of extortion as it had been adopted by the states, with especial reference to the law of New York, from which the Hobbs Act's language was taken. *See* 91 Cong. Rec. 11843 (remarks of Rep. Michener), 11900 (remarks of Rep. Hobbs), 11909 (remarks of Rep. Summers), 11910 (colloquy of Reps. Robeson and Springer), 11913 (remarks of Rep. Rhea), 11914 (remarks of Rep. Russell) (1945). *See also United States* v. *Enmons, supra,* 410 U.S. at 406 n.16; *United States* v. *Harding,* 563 F.2d 299, 302-06 (6th Cir. 1977), *cert. denied,* 434 U.S. 1062 (1978); *United States* v. *Mazzei,* 521 F.2d 639, 644-45 (3d Cir.) (en banc), *cert. denied,* 423 U.S. 1014 (1975); *id.* at 650-55 (Gibbons, J., dissenting). *See generally* Stern, *Prosecutions of Local Political Corruption under the Hobbs Act,* 3 SETON HALL L. REV. 1 (1971).

Appellee's conduct in this case is not meaningfully distinguishable from that found to be extortion in an old New York case, *People* v. *Whaley,* 6 Cow. 661 (Sup. Ct. 1827), upon which the "color of official right" language in the New York extortion statute (and thereby the Hobbs Act) was in part based. *See United States* v. *Mazzei, supra,* 521 F.2d at 653-54 (Gibbons, J., dissenting). *Whaley* involved the extortion conviction of a judge who had presided over an action for debt on a note. In the debt action the creditor had failed to appear in court and the case was apparently dismissed or "discontinued." However, the debtor nevertheless confessed judgment and the judge received payment in spite of the discontinuance of the debt action, an act found to be extortion. In the instant case, because the jury could have found that Torrey's check to the city put an end to his obligation to the city on the bond, Torrey's position was analogous to that of the debtor after the creditor's action had been discontinued. Nevertheless, appellee demanded additional payment from Torrey in settlement of the bond, as the New York judge had demanded payment upon the debt despite discontinuance of the action. It does not avail appellee to claim that the additional payment was a part of the full amount of

Torrey's bond, any more than it would have availed the defendant in the *Whaley* case to claim that he took nothing other than money the debtor confessed to owing. In either case, the jury could have found nevertheless that the money taken was not due to the taker, whoever else might have been rightfully entitled to payment. In short, appellee used his office to take money wrongfully, for appellee was not entitled to any personal fee for discharging the bond.

Moreover, even if the full $512 were actually due the city on each bond, it would be extortion for appellee to seek and obtain a $100 fee for himself personally as a *quid pro quo* for refraining from collecting the full amount he should have collected on the bonds. In general, a public officer who corruptly seeks a payment in return for short-changing his duty to enforce the law has committed extortion. "It matter not whether the public official induces payments to perform his duties or not to perform his dutes. . . . So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of [Hobbs Act extortion]." *Unitd States* v. *Braasch,* 505 F.2d 139, 151 (7th Cir. 1974), *cert. denied,* 421 U.S. 910 (1975). *See also United States* v. *Brown, supra,* 540 F.2d at 372-73 (payments by construction contractors to city building commissioner with regulatory authority over them); *United States* v. *Price,* 507 F.2d 1349 (4th Cir. 1974) (per curiam) (payment by property owner in return for county council member's use of influence to obtain occupancy permit for property despite building code violations); *Ladner* v. *United States,* 168 F.2d 771 (5th Cir.), *cert. denied,* 335 U.S. 827 (1948) (conspiracy to extort payments in return for failure to prosecute unlawful acts); *People* v. *Sheridan,* 186 A.D. 211, 174 N.Y.S. 327 (1919) (extortion by elevator inspector demanding payment in return for failure to report defective elevator); Annot., 70 A.L.R.3d 1153, 1160 (1976). *But see* Ruff, *Federal Prosecution of Local Corruption,* 65 GEO. L. REV. 1171, 1174-96 (1977). In this case appellee is likewise alleged to have taken payments for himself personally in return for shortchanging his duty to the city by failing to col-

lect the full $512 amount of the bonds. Appellee therefore would have induced payments to himself on the basis of performing or not performing his official duties. Such conduct is Hobbs Act extortion under color of official right. It makes no difference in our analysis whether appellee's duty involved collection of money or some other task. *See, e.g., United States* v. *Frumento,* 405 F. Supp. 23, 30-31 (E.D. Pa. 1975) (indictment was sufficient to charge Hobbs Act extortion conspiracy, where revenue official sought wrongful fee in return for aid to cigarette dealer in evading taxes).

Such conduct is no less extortion because the "victim" may in some sense receive an economic benefit when the public official neglects his duty. *See United States* v. *Butler,* Nos. 79-5046, 79-5047 (6th Cir. Mar. 26, 1980) (slip op. at 14). *Cf. United States* v. *Howe,* 353 F. Supp. 419 (W.D. Mo. 1973) (extortion "victim" compelled to allow vending machine on premises and to give up only part of profits to extortioner; therefore some profits were retained by the "victim"). The argument that the "victim" has suffered no loss is merely the converse of the argument that the money appellee took was part of the sum rightfully due the city. But the jury could have found that the money appellee took was a wrongful personal fee in return for reducing or failing to enforce the city's claim.

It is the wrongful purpose of the taking under color of official right that makes appellee's conduct extortion under the Hobbs Act. The Supreme Court in *United States* v. *Enmons, supra,* 410 U.S. at 400, distinguished between a case of Hobbs Act extortion by a labor union official threatening violence to obtain a personal payoff, and a case not covered by the Hobbs Act where union members threaten violence in a strike to obtain a more favorable wage settlement. Although the Court pointed out that the latter kind of strike violence may be unlawful under local law, there is no violation of the Hobbs Act where the union members threaten violence to obtain higher wage payments, a legitimate end which is not a wrongful taking of

money under the Hobbs Act. By contrast, a union official does commit Hobbs Act extortion by using threats to obtain a personal payment which would *not* be a legitimate end of labor activity and which is therefore a wrongful payment. Likewise, in the instant case there was evidence that appellee obtained a wrongful payment for himself under color of office, an act analogous to a union official who took a personal payoff in return for accepting a reduced wage level in settlement of a strike. Under the *Enmons* case, the taking was wrongful for purposes of the Hobbs Act.

Furthermore, in *Enmons* special factors may have entered into the Court's consideration of strike violence by union members seeking higher benefits, for the text of the Hobbs Act and legislative history demonstrate a Congressional purpose not to restrain strike activity. *Id.* at 400-408; *see* 18 U.S.C. § 1951(c) (no implied repeal under the Hobbs Act of other federal labor laws governing strikes). Therefore, the Hobbs Act does not cover coercive action by unions in pursuit of legitimate labor goals of higher wages or increased benefits, but the Hobbs Act coverage may nevertheless extend to other kinds of wrongful taking of money to which the extortioner may also have a rightful claim. Thus, one court has held in a Hobbs Act case that the *Enmons* holding did not support a defense that the allegedly extortionate acts of the defendants, members of the Seminole Nation, were in pursuit of a rightful claim for reparations on behalf of the Nation. *United States* v. *Warledo,* 557 F.2d 721, 728-30 (10th Cir. 1977) (approving exclusion at trial of evidence relating to reparations claim). Under state law the rule appears to be that one who takes money extortionately cannot defend on the basis that the money collected thereby was in satisfaction of a legitimate debt. *E.g., State* v. *Adjustment Department Credit Bureau,* 94 Idaho 156, 483 P.2d 687 (1971); *People* v. *Maranian,* 359 Mich. 361, 102 N.W.2d 568 (1960); *People* v. *Fichtner,* 28 A.D. 159, 118 N.Y.S.2d 392 (1952), *aff'd,* 305 N.Y. 864, 114 N.E.2d 212 (1953). *See generally*

Annot., 135 A.L.R. 728 (1941). Likewise, it does not justify extortion of a wrongful payment under color of official right that the payment came from one who had a legitimate debt to the government. Thus, we are convinced that the evidence could support conviction for Hobbs Act extortion in this case.[5]

II. Effect on Commerce

The Hobbs Act does not prohibit extortion generally, but rather penalizes "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by . . . extortion . . ." 18 U.S.C. § 1951(a). As the district court recognized, "[i]f the resources of a business which affects interstate commerce are depleted and

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[5] Appellee relies on two other cases which do not support his position. *United States* v. *McNeive,* 536 F.2d 1245 (8th Cir. 1976), was a mail fraud case in which a plumbing inspector took small personal payments from contractors. The evidence failed to show that the payments affected the inspector's "discretionary judgment [or] result[ed] in any official preferential treatment . . . ." *Id.* at 1251. The court stated that acceptance of the payments could not be characterized as an "extortion." *Id.* In the instant case by contrast evidence showed that the cash payments to appellee resulted in "preferential treatment" when the defaulted bonds were settled at a reduced rate."

United States v. *Adcock,* 558 F.2d 397 (8th Cir.), *cert. denied,* 434 U.S. 921 (1977), was a Hobbs Act extortion case in which a member of a state liquor commission took kickbacks in return for inducing the commission to purchase wine from the "victim" for resale in state operated liquor stores. In holding that evidence of the "victim's" state of mind was admissible to prove that the payments were compelled by fear of economic loss, this court noted, "extortion connotes some form of coercion." *Id.* at 404. In this case appellee is charged solely with extortion under color of official right. As the court in *Adcock* recognized, this kind of extortion need not be accomplished by force, threats or use of fear. *See id.* at 403. Hence, it is irrelevant that Torrey made the cash payments to appellee voluntarily, so long as appellee was acting under color of official right. *See generally United States* v. *Rabbitt,* 583 F.2d 1014, 1026-28 (8th Cir. 1978), *cert. denied,* 439 U.S. 1116 (1979).

diminished as a result of extortion, then interstate commerce is affected," *United States* v. *Rabbitt,* 583 F.2d 1014, 1023 (8th Cir. 1978), *cert. denied,* 439 U.S. 1116 (1979), and "[t]he connection with interstate commerce need only be slight." *Id., citing United States* v. *Culbert,* 435 U.S. 371 (1978). *See also United States* v. *Irali,* 503 F.2d 1295 (7th Cir. 1974), *cert. denied,* 420 U.S. 990 (1975) (effect on commerce found where payment of $150 was extorted by local official from tavern owner who purchased liquor from state distributors who in turn purchased liquor interstate).

There was no dispute that Torrey in the course of his bail bond business purchased articles, such as gasoline and certain office supplies, that had been in interstate commerce. However, the district court found that, although Torrey did purchase supplies for his bail bond business from interstate commerce, the resources available to Torrey to make such purchases were not depleted by any payments to appellee. The court reasoned that, because Torrey's total payments to the city and appellee amounted to less than the face amount of the bonds that would have been due otherwise, Torrey had *more,* not less, money to purchase items in interstate commerce as a result of his payment to appellee. On this basis, the district court held that the government failed to prove an effect on interstate commerce under a depletion-of-resources analysis.

For reversal the government argues that the Hobbs Act prohibits all extortion affecting commerce, not just extortion which has an "adverse" effect.[6] We have some difficulty with this

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[6] Moreover, argues the government, Torrey's wrongful cash payments to appellee temporarily depleted Torrey's resources, even if in the long run Torrey would have had more resources because of his avoidance of his legitimate debt to the city. We do not understand how Torrey's aggregate resources were temporarily depleted by his cash payments to appellee, as the evidence indicates that Torrey settled the bonds at the time of the extortion and therefore no time interval occurred between the extortionate payment and receipt of the net financial benefit of the settlement.

theory. Although the Hobbs Act on its face prohibits all extortion which "in any way or degree . . . affects commerce," the legislative history of the Act strongly indicates that Congress intended to protect the free flow of commerce and prevent exaction of any unlawful tribute from interstate commerce, and indicates no Congressional intent whatsoever to punish activity absent some adverse effect on interstate commerce. *See* H.R. Rep. No. 238, 79th Cong., 1st Sess. (1945), *reprinted in* [1946] U.S. CODE CONG. & AD. NEWS 1360, 1370; 91 Cong. Rec. 11839-848, 11899-922 (1945) (debate in House of Representatives on Hobbs Act). Moreover, the government's theory seems to suggest that a robbery or extortion automatically would affect commerce as long as the victim engages in transactions involving articles which have been in interstate commerce. Courts have found such an effect where the evidence shows some depletion of resources which the victim would otherwise have used in transactions involving articles which had been in interstate commerce,[7] or even in some cases where the

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[7] *E.g., United States* v. *Blakey,* 607 F.2d 779 (7th Cir. 1979) (extortion of payments from illegal operation which used for a "front" a tire business which resold tires purchased in interstate commerce); *United States* v. *Richardson,* 596 F.2d 157, 161 & n.6 (6th Cir. 1979) (evidence that payments extorted from intrastate business would have been used to purchase articles from interstate commerce); *United States* v. *Chiantese,* 582 F.2d 974, 980 & n.16 (5th Cir. 1978), *cert. denied,* 441 U.S. 922 (1979) (evidence that local parking lot used financing and articles from interstate commerce); *United States* v. *Irali, supra,* 503 F.2d at 1298 (evidence that extorted payments impeded ability of victim to purchase supplies which had been in interstate commerce). *Cf. Stirone* v. *United States, supra,* 361 U.S. at 215 (extortionate threats against local business which used supplies from interstate commerce affected commerce because threatened interference with business would slow up or stop use of supplies).

evidence showed only a possibility that the money taken would have been used in such transactions.[8] The government's theory in this case would base federal jurisdiction upon a more tenuous nexus with interstate commerce, as there was no testimony that, absent the extortion, Torrey would have spent less or more money on the articles which he regularly purchased from interstate commerce, or that failure to pay appellee off would threaten any consequences which would result in an increase or decrease in commerce.[9] The government's theory would, therefore, extend Hobbs Act coverage to any money taken by robbery or extortion from anyone who engaged in transactions involving goods which had been in interstate commerce, a reading of the Hobbs Act which in practicality would extend federal

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[8] *See e.g., United States* v. *Cerilli,* 603 F.2d 415 (3d Cir. 1979), *cert. denied,* 100 S. Ct. 728 (1980); *United States* v. *Staszcuk,* 517 F.2d 53 (7th Cir.) (en banc), *cert. denied,* 423 U.S. 837 (1975). *But see Comment,* 66 J. CRIM. L. & CRIMINOLOGY 306, 318-20 (1975) (arguing that because the Hobbs Act contains no legislative finding that extortion affects interstate commerce, effect upon commerce must be proven in every case and a potential effect would not be adequate to support invoking the Hobbs Act). *See also Comment,* 1972 U. ILL. L. F. 805.

[9] The government at oral argument seemed to argue that, if Torrey did not pay appellee off, Torrey may have been disqualified as a bondsman for failure to satisfy his obligation under the bonds. The government seems to suggest that Torrey would then be placed on the "bad bond list," *see* note 2 *supra.* We regard this theory as speculative, for the record suggests to the contrary that Torrey would have likely paid the bonds in full if faced with no other alternative than disqualification. (Indeed there was testimony that, when appellee at one time attempted to increase the settlement totals to about $400, including both payment to the city and to appellee personally, Torrey decided to pay the whole $512 instead because income tax savings by deducting the full $512 outweighed the savings of paying a reduced amount part of which would be a nondeductible cash payoff.) Therefore, we cannot conclude that appellee obtained the payments under an implied threat to disqualify Torrey as a bondsman and thus curtail that part of Torrey's business which involved interstate transactions. *Cf. Stirone* v. *United States, supra,* 361 U.S. at 215.

jurisdiction over just about any robbery or extortion. Such an assumption by the federal government of general jurisdiction over common law crimes traditionally covered by local law is something we would not lightly imply. *See United States* v. *Bass,* 404 U.S. 336, 349 (1971); *Rewis* v. *United States,* 401 U.S. 808 (1971).

We note, however, that there is also support for the government's position. The Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion . . . ." *Stirone* v. *United States, supra,* 361 U.S. at 215. Appellant cites cases wherein the extortionate conduct assertedly resulted in an ultimate increase in interstate commerce, as where a public official seeks a payment in return for a favorable vote that improves the "victim's" business and thereby ultimately increases interstate commerce. Perhaps the language of the Hobbs Act covering "whoever *in any way or degree* affects commerce," 18 U.S.C. § 1951(a), creates jurisdiction over all extortion with even the most indirect connection to interstate commerce. We do not need to decide in this case, however, whether or not Hobbs Act jurisdiction could be based upon such indirect effects upon commerce because there was evidence from which the jury could have concluded that Torrey's bail bond business itself was interstate commerce.

Torrey testified that he was acting as an agent for a New York insurance firm, Stiverson Insurance Company, which received a premium on the bonds he wrote.[10] Torrey further testified he wrote bonds on defendants who lived out of state and that he travelled out of state with some regularity in order to return

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[10] Torrey testified that he wrote bonds as an agent for a St. Louis insurance firm. The record does not make clear if the New York firm or St. Louis firm or both firms underwrote the bonds in question in this case.

defendants under his bonds who had filed.[11] We note that there was no proof any out-of-state firm was directly involved in the particular bonds mentioned in the counts upon which appellee was convicted and no proof of interstate activity directly relating to these particular bonds. Nevertheless the evidence does support the conclusion that the alleged extortionate payments were taken from a business regularly and substantially involved in interstate commerce, and we think this evidence sufficient to bring appellee's conduct under the coverage of the Hobbs Act.

Because the extortionate payments were extracted directly from an interstate enterprise, this case differs from a Hobbs Act prosecution of a public official who extorts money from a purely local enterprise, where the extortioner affects commerce by extracting funds that would have been used to purchase articles in interstate commerce. Under the Hobbs Act an indirect effect on commerce must be shown where the extortion does not directly involve an interstate enterprise. In the instant case by contrast the extortion directly affected interstate commerce, because the business from which payments were taken was itself engaged in interstate commerce. *United States* v. *Gates,* 616 F.2d 1103 (9th Cir. 1980); *United States* v. *Rabbitt, supra,* 583 F.2d at 1023; *United States* v. *Phillips,* 577 F.2d 495 (9th Cir.), *cert. denied,* 439 U.S. 831 (1978); *United States* v. *Harding, supra,* 563 F.2d at 302; *United States* v. *Brown, supra,* 540 F.2d at 373; *United States* v. *Hathaway,* 534 F.2d 386 (1st Cir.), *cert. denied,* 429 U.S. 819 (1976). "Neither the [Hobbs Act] nor the Constitution requires that the company be engaged in an interstate transaction at the moment of the extortion to support federal jurisdiction." *United States* v. *Hyde,* 448 F.2d 815, 836

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[11] Torrey testified without contradiction that he wrote 6 to 8 bonds per year on out of state defendants and travelled 3 to 4 times per year out of state to apprehend bail jumpers whom he had bonded. According to Torrey, he wrote 50 to 75 bonds per year or else 2 to 3 per week.

(5th Cir. 1971), *cert. denied,* 404 U.S. 1058 (1972). The payment cannot be hidden by an accounting trick that would demonstrate that the wrongful payment had no effect on the bottom line of the income sheet. *Id.* Whatever the significance to Torrey of the payment, the jury found that appellee took money wrongfully from an interstate enterprise.

Furthermore, even if we were to conceive the entire extortionate transaction as a benefit to Torrey's business, as appellee suggests, we still conclude interstate commerce was affected. The evidence indicates that Torrey did not lawfully have to make the cash payments to appellee; in some cases he went ahead and actually paid the full amount ($512) due on the bond. If appellee offered a reduced settlement of $212 or $262 to bondsmen in return for a wrongful $100 cash payment, appellee put those bondsmen willing to engage in corruption at a competitive advantage vis-a-vis any bondsman who would not make the cash payoff. By becoming involved with an enterprise in interstate commerce and creating an incentive to participation in corrupt practices, appellee affected the quality of interstate commerce if not its quantity. *Cf. United States* v. *Harding, supra,* 563 F.2d at 300-01 (effect on commerce where official of state real estate commission solicits payoff in return for offering to help "victim" cheat on qualifying examination for real estate brokers engaged in interstate transactions). Therefore, the moment the extortionate payment was made, there was an effect on interstate commerce, whether this effect is characterized as extraction of a wrongful tribute by a local official from an interstate enterprise, or as an infusion of corrupt practices into an enterprise whose activities reached across state lines.

Accordingly, the judgment of acquittal is reversed, and the case is remanded to the district court with directions to vacate the judgment of acquittal, reinstate the judgment of conviction based on the jury verdict, and to sentence appellee.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX "C"

Order of United States Court of Appeals, Eighth Circuit denying Appellee's Petition for Rehearing and Rehearing En Banc, August 28, 1980 in *United States* v. *R. C. French.*

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1096

September Term, 1979

United States of America,
Appellant,

vs.

R. C. French,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri

The Court, having considered appellee's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

August 28, 1980